Nos. 80-5484 and 80-5491

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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HOWARD GREGORY BLUM, PETITIONER

v.

UNITED STATES OF AMERICA

PETER J. MACHI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in refusing to suppress guns found during a warrantless search of a duffle bag found in a stolen vehicle.

2. Whether the district court erred in conducting an in camera proceeding relating to disclosure of the address of an informant and in concluding that the government should not be required to disclose the address.

3. Whether the district court's instructions concerning withdrawal from the conspiracy were erroneous (No. 80-5484 only).

4. Whether there was sufficient evidence to sustain petitioner Blum's conviction on a firearms charge (No. 80-5484 only).

5. Whether there was probable cause for petitioner Blum's arrest (No. 80-5484 only).

OPINION BELOW

The judgment order of the court of appeals (No. 80-5484 Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1980. The petition for a writ of certiorari in No. 80-5484 was filed on October 1, 1980. The petition for a writ of certiorari in No. 80-5491 was filed on October 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners and co-defendant James Eckman were convicted of conspiracy to rob an armored car carrying bank funds, in violation of 18 U.S.C. 371 and 2113(b), and of unlawfully carrying firearms in the course of the conspiracy, in violation of 18 U.S.C. 924(c). Petitioners and Eckman were sentenced to consecutive terms of five years' imprisonment on the conspiracy conviction and three years' imprisonment on the firearms conviction. The court of appeals affirmed (No. 80-5484 Pet. App.).

The evidence at trial showed that in May 1979 petitioners, co-defendant Eckman, Eugene Mercier and Aedan McCarthy[1/] planned to rob a Cauley armored car company vehicle on its route through Monroeville, Pennsylvania. They subsequently decided, however, that that route offered little chance for success (Tr. 52-57).[2/] In July 1979, they turned their attention to another Cauley car (Number 12), following it on its route and observing that its drivers habitually stopped for a two-hour lunch at the Valencia Lounge (Tr. 58-66). They decided that the lunch stop

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1/ McCarthy testified for the government at trial pursuant to a plea bargain. He was sentenced to 18 months' imprisonment.

2/ "Tr." refers to the trial transcript. "S. Tr." refers to the transcript of the pretrial suppression hearing.

provided a good opportunity to rob the car and planned to commit the crime on Tuesday, August 7, 1979, when the car would be carrying a large amount of money (Tr. 83).

On July 20, 1979, petitioners and their cohorts went to the Cauley parking lot and made measurements of car Number 12 in order to make a device for unlocking the car (Tr. 66-69). They returned to the Cauley lot on several subsequent occasions to inspect the locks on armored car Number 12 and to test their keys (Tr. 77-83, 98-101).

On July 24, 1979, petitioner Machi, together with McCarthy, Mercier and Eckman, again followed car Number 12. On that occasion, FBI agents, who were receiving periodic tips about the planning of the robbery from an unidentified informant, observed petitioner Machi's van along the armored car's route, and an agent saw Eckman inside the Valencia Lounge inspecting the layout of the bar (Tr. 72-77, 215-225, 228-229). On Tuesday, July 31, 1979, while under FBI surveillance, petitioner Machi, McCarthy and Eckman met at Uncle Charlie's Restaurant parking lot, which was less than a mile from the Valencia Lounge. Eckman went to the lounge and waited inside. Machi and McCarthy, using Machi's van, followed car Number 12 to the lounge and parked next to it. Machi then followed the drivers inside the lounge. The three men returned to the restaurant about thirty minutes later (Tr. 101-105).

The next step in preparation for the robbery occurred on August 5, 1979, when petitioners, McCarthy, Eckman and Mercier stole a 1978 white Ford Econoline van and a 1979 red and silver Ford Bronco for use in the crime (S. Tr. 62-69; 105-108). On Tuesday, August 7, 1979, the day chosen for the robbery, petitioners, Eckman and McCarthy met at McCarthy's house. Petitioner Blum and Eckman arrived with an M-1 semi-automatic carbine, a police radio scanner and some walkie-talkies. McCarthy provided two pistols (Tr. 110-112).

After packing the weapons and other equipment in one duffle bag, the four men went to Uncle Charlie's Restaurant. Machi, who was driving his nephew's car, drove to the Valencia Lounge. Eckman followed in the Ford Bronco and brought Machi back to Uncle Charlie's. All four then traveled north of the Valencia Lounge in the Econoline van and waited for car Number 12 to pass. Meanwhile, Eckman put on a guard uniform (Tr. 115-119).

When the armored car passed, they followed it to the Valencia Lounge. The parking lot was particularly crowded, however, and the armored car had parked in the front rather than on the side as was customary. The van returned to Uncle Charlie's Restaurant, and Eckman and Blum went back to the lounge in the Bronco. After a few minutes, Eckman and Blum returned to Uncle Charlie's, and the group decided that they would have to wait until the following Tuesday when the armored car would again be parked on the side. Eckman drove Machi back to the lounge to get Machi's car (Tr. 120-121).

After Eckman and Machi rejoined the rest of the group at Uncle Charlie's, FBI agents arrested petitioners, Eckman and McCarthy. The agents confiscated the two stolen vehicles and transported them to a nearby county police academy (S. Tr. 78). There the FBI contacted the owner of the vehicles, German Motors, and obtained its consent to search them (S. Tr. 79). The search uncovered weapons and other instrumentalities of the crime in the duffle bag taken from the Econoline van (S. Tr. 80).

ARGUMENT

1. Relying upon Chadwick v. United States, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979), petitioners contend that the police acted unlawfully in searching the zippered duffle bag found in the stolen van. This contention is without merit.

In Chadwick and Sanders, this Court held that, as a general rule, a warrant is necessary to search luggage seized from an

automobile that the police have probable cause to believe contains contraband. The Court stated (Arkansas v. Sanders, supra, 442 U.S. at 764): "* * * a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations." Therefore, it concluded that a search warrant for luggage is necessary even if luggage is found in a vehicle subject to search under the automobile exception to the warrant requirement. These decisions, however, have no application to the instant case, where the van in which the duffle bag was located had been stolen by petitioners a few days before the planned robbery for use in the crime and the owner of the van had consented to its search.3/

First, the police acted lawfully in searching the bag. When police seize a stolen car, they are permitted to search it and its contents without a warrant. United States v. Zaicek, 519 F.2d 412, 414-415 (2d Cir. 1975). Moreover, it is undisputed that they had obtained the consent of the owner of the van to search the van and its contents. The scope of this consent certainly extended to the contents of an unlocked bag. See United States v. Boston, 508 F.2d 1171, 1178 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975). Cf. Frazier v. Cupp, 394 U.S. 731, 740 (1969).

In any event, petitioners had no privacy interest in the duffle bag sufficient to enable them to challenge its search. Petitioner Blum asserts no privacy interest whatsoever in the duffle bag; he relies (Pet. 14) on the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960), overruled in United States v. Salvucci, No. 79-244 (June 25, 1980). Peti-

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3/ For the same reason, petitioner Machi's suggestion that this case "points up" the alleged conflict between Arkansas v. Sanders, supra, and United States v. Milhollan, 599 F.2d 518 (3d Cir.), cert. denied, 444 U.S. 909 (1979), is erroneous. Milhollan, which this Court declined to review, involved neither a stolen vehicle nor a consent to search.

tioner Machi seems to suggest (Pet. 6-7) that his possessory interest in the bag is sufficiently shown by the fact that he had been riding earlier in the same stolen van that contained the bag. In any case, a mere possessory interest in a searched item does not establish a right to challenge its search. United States v. Salvucci, supra, slip op. 8. Even assuming that they had a possessory interest in the bag, it is apparent that petitioners have no basis for objecting to the search.

A defendant may object to a search as a violation of the Fourth Amendment only when the search violates his legitimate expectation of privacy (Rakas v. Illinois, 439 U.S. 128, 139-140 (1978)) or one that "society is prepared to recognize as 'reasonable,'" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This Court has accordingly indicated its approval of the rule that a person present in a stolen automobile may not challenge a search of that automobile because he has no legitimate expectation of privacy in it. Rakas v. Illinois, supra, 439 U.S. at 141 n.9. See, e.g., United States ex rel. Laws v. Yeager, 448 F.2d 74, 85 (3d Cir. 1971), cert. denied, 405 U.S. 976 (1972); Williams v. United States, 323 F.2d 90, 95 (10th Cir. 1963).

It is similarly true that a person retains no legitimate expectation of privacy in an unlocked duffle bag when he places it in a stolen car. Here, petitioners clearly abandoned their privacy interest in the contents of the bag when they placed it in the stolen vehicle. They assumed the risk that the vehicle would be restored to its rightful owner, in which case the owner would surely have examined its contents, including that of the unlocked bag. Petitioners could also expect that the owner of the van would permit the authorities to search the van. See Government of Virgin Islands v. Gereau, 502 F.2d 914, 926-927 (3d Cir. 1974), cert. denied, 421 U.S. 1001 (1975). Even without the consent of the owner, a stolen vehicle is subject to an inventory

search when recovered by the police. South Dakota v. Opperman, 428 U.S. 364 (1976). The situation here is analogous to one in which a person leaves his belongings in the custody of a third party; he assumes the risk that the third party will examine those belongings or consent to an examination by someone else. See Rawlings v. Kentucky, No. 79-5146 (June 25, 1980), slip op. 6. As in Rawlings, petitioners took no special precautions to protect their privacy interest; they did not even lock the bag. Accordingly, petitioners may not object to the search of the bag.4/

2. Petitioners contend (80-5484 Pet. 15-18; 80-5491 Pet. 5-9) that the district court erred in failing to require the government to disclose the address of Eugene Mercier, a participant in the conspiracy. This contention is without merit.

After the government rested its case, petitioners asked for Mercier's address on the ground that he was a "material witness." There was also a suggestion that Mercier might have been an FBI informant (Tr. 431-432). The government, however, refused to divulge anything about Mercier, not even whether it had his address. The district court observed (Tr. 433-435) that petitioner Blum knew Mercier "very well" as reflected by co-conspirator McCarthy's testimony that they, along with petitioner Machi, had "met together * * * at least six or seven times in the alleged planning of this robbery," and that there was "no evidence * * * whatsoever that [Mercier] was [involved in the scheme as] a Government agent." The court also pointed out (Tr. 434) that "Mercier probably doesn't want to be subpoenaed, probably can't be found and if he was subpoenaed * * * chances are he'd claim his privilege against self-incrimination." Nonetheless, the court ruled that it would require the government to disclose

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4/ Cf. United States v. Ochs, 595 F.2d 1247, 1253 (2d Cir. 1979) (the defendant could challenge the search of a briefcase found in a car he had borrowed because he was legitimately in possession of the car and entitled to exclude others from it).

Mercier's last known address, absent a showing that Mercier "must be protected for security reasons" (Tr. 435). The government requested an opportunity to make a presentation concerning that matter in chambers and out of the presence of the defense. After an in camera presentation by the government,[5/] the district court denied the motion for disclosure of Mercier's address "based upon the representations of the [government]" (Tr. 439).

Petitioners' argument that disclosure of Mercier's address was compelled under this Court's decision in Roviaro v. United States, 353 U.S. 53 (1957), is meritless. Roviaro recognizes a governmental privilege not to reveal the identity of informants who give it information concerning violations of the law. At the same time, however, the Court recognized in Roviaro that "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way" (id. at 60-61; footnote omitted). On the facts of Roviaro, the balance between "the public interest in protecting the flow of information [and] the individual's right to prepare his defense" fell on the side of disclosure. Id. at 62. The Court nevertheless reaffirmed that "public policy forbids disclosure of an informant's identity unless essential to the defense." Id. at 61 n.9, quoting Scher v. United States, 305 U.S. 251, 254 (1938).

The balancing test called for in Roviaro does not apply in this case, because there was no doubt that petitioners were aware of Mercier's identity. As the district court observed (Tr. 433, 436-437), petitioners knew Mercier "very well." Roviaro requires the government, under certain circumstances, to reveal an informant's identity; it does not require it to assist in producing him at trial. See, e.g., United States v. Powers, 572

5/ The transcript of the in camera presentation was placed under seal by the district court.

F.2d 146, 153 (8th Cir. 1978); United States v. Fuentes, 563 F.2d 527, 534 (2d Cir.), cert. denied, 434 U.S. 959 (1977). In any event, this is not a case like Roviaro, where the "'informer was the sole participant, other than the accused, in the transaction charged'" and his testimony would have been "highly relevant." 353 U.S. at 63-64; see McCray v. Illinois, 386 U.S. 300, 310-311 (1967). There is no suggestion in the record that Mercier would have cast any doubt on co-conspirator McCarthy's testimony, which was closely corroborated by the evidence gleaned from the FBI's surveillance operations. And as the district court observed (Tr. 434-435), there was no evidence of entrapment here. Indeed, the lack of importance of Mercier to the defense is underscored by the fact that petitioners made no effort to locate him prior to trial even though he had participated in the scheme and was well known to them. Thus, petitioners have made no showing that the district court abused its discretion in denying petitioners' motion for disclosure of Mercier's address.6/

3. Petitioner Blum contends (Pet. 18-19) that the district court erred by instructing the jury that a defendant does not escape criminal liability for conspiracy if he withdraws from a conspiracy after an overt act had been committed. This contention is without merit.

The general rule of abandonment of conspiracy is that "a defendant is not punishable as a member of the conspiracy if he withdraws before an overt act is committed." United States v. Heckman, 479 F.2d 726, 729 (3d Cir. 1973). See also United States v. Monroe, 552 F.2d 860, 864-865 (9th Cir.), cert. denied,

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6/ There is similarly no substance to petitioner Blum's claim (Pet. 18) that the district court erred in permitting the government to make an in camera presentation concerning Mercier. An in camera examination is an appropriate means of resolving the dilemma facing a court when it "'must determine whether the circumstances are appropriate for the claim of privilege * * * without forcing disclosure of the very thing the privilege is designed to protect.'" See Black v. Sheraton Corporation of America, 564 F.2d 550, 553 (D.C. Cir. 1977), quoting United States v. Reynolds, 345 U.S. 1, 8 (1953).

431 U.S. 972 (1977). Once an overt act has been committed, withdrawal from the conspiracy may still be relevant for purposes of measuring the statute of limitations (see United States v. United States Gypsum Co., 550 F.2d 115, 129-130 (3d Cir. 1977), aff'd, 438 U.S. 422 (1978)), or determining the admissibility of statements made by co-conspirators, see United States v. Mardian, 546 F.2d 973, 978 n.5 (D.C. Cir. 1976). But a conspirator cannot erase a completed conspiracy offense by withdrawing after all the elements of an offense under 18 U.S.C. 371 have been committed. See, e.g., United States v. Monroe, supra, 552 F.2d at 864.

Moreover, even if the charge on withdrawal was erroneous, it is clear petitioner Blum was not prejudiced thereby. Once a defendant's participation in a conspiracy or other continuing illegal act is shown, his participation is presumed to continue throughout the period of unlawful activity unless he produces affirmative evidence of withdrawal. See, e.g., Hyde v. United States, 225 U.S. 347, 369 (1912); United States v. Gillen, 599 F.2d 541, 548 (3d Cir.), cert. denied, 444 U.S. 866 (1979). Mere cessation of activity in furtherance of the illegal activity is not enough to establish withdrawal. Rather, withdrawal must be demonstrated by affirmative acts inconsistent with the objects of the conspiracy that disavow or defeat the conspiratorial purposes, and these acts must be communicated either in a manner reasonably calculated to reach co-conspirators or by making full disclosure to the authorities. The defendant bears the burden of demonstrating such affirmative acts. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 464-465 (1978); Hyde v. United States, supra, 225 U.S. at 369; United States v. Gillen, supra, 599 F.2d at 548; United States v. Wentland, 582 F.2d 1022, 1025-1026 (5th Cir. 1978), cert. denied, 439 U.S. 1133 (1979); United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965).

Petitioner Blum was arrested with the other conspirators on the day of the planned robbery in the vicinity of the armored car and in possession of the vehicles that had been stolen for use in the robbery, which contained weapons and other instrumentalities of the crime. The robbery had not been committed that day because the armored car was not parked where the conspirators had hoped, and the evidence at trial indicated that they had decided only to postpone the robbery until the following week (Tr. 120-121). Thus, the record in this case offers no support for the contention that petitioner Blum had abandoned or withdrawn from the conspiracy.

4. As petitioner Blum points out (Pet. 20), to sustain a conviction for carrying firearms during a felony under 18 U.S.C. 924(c) the government must prove that the separate act of carrying the firearms involved constituted a distinct violation of law. See United States v. Elorduy, 612 F.2d 986, 990 (5th Cir. 1980). Petitioner Blum contends (Pet. 19-20) that he was improperly convicted under Section 924(c) because the government failed to prove that he was not licensed to carry a firearm in Pennsylvania. This claim is groundless.

It is true that the state trooper who conducted the search of Pennsylvania records, which are indexed according to name and date of birth (Tr. 410), did not use petitioner's correct date of birth, and he testified that this error possibly could have affected the validity of the search that concluded that petitioner Blum had not been issued a license in Pennsylvania. However, independent evidence showed that petitioner Blum was not licensed to carry any firearms by either the City of Pittsburgh or Allegheny County (Tr. 383-384, 389). Co-conspirator McCarthy, the owner of the weapons, who conceded that he was not registered to carry them (Tr. 194), was a resident of Allegheny County. Petitioner Blum was a resident of the State of Ohio. Thus, petitioner Blum's argument rests on the theoretical, but highly

unlikely, possibility that he was registered to carry handguns belonging to McCarthy by a state in which he did not live and by a county in which neither he nor McCarthy lived. The evidence introduced by the government was sufficient to sustain its burden under Section 924(c) and, in light of the fact that Blum did not represent that he was registered to carry the handguns (see Tr. 418), to support the jury's verdict.7/

5. Petitioner Blum also contends (Pet. 14) that the FBI lacked probable cause to arrest him. This contention is without merit.

It is true that the FBI did not recognize Blum from their earlier surveillance. However, it was known from the beginning of the investigation that four principals were involved in the robbery scheme (S. Tr. 44). Thus, when four men, including Blum, arrived in the vicinity of the armored truck on the day the robbery was to occur in two vehicles that had been stolen for use in the robbery, there was clearly probable cause to believe that all four men were involved in the conspiracy. Moreover, when the agents announced their identity, petitioner Blum attempted to escape by jumping over a fence (S. Tr. 75).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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7/ When the mistake in the birth date came to light, the government offered to recheck the records. The court declined to hold up the trial for this purpose, noting that Blum was not representing that he had a license and that the evidence was sufficient to show that he did not have one (Tr. 418-419).

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